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Lenging ak Kapor v Davin ak Dominicus Kamber

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HIGH COURT (KUCHING) — DIVORCE PETITION NO KCH-33–117/7 OF 2015
STEPHEN CHUNG J
7 APRIL 2017

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Family Law — Divorce — Consent order made — Decree nisi granted — Custody and care of children — Application to vary court order — No opportunity to oppose variation order — Whether decree nisi should be reinstated — Whether variation order to be set aside

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There were two applications. The parties agreed for the first application ('encl 40') to be heard first. Enclosure 40 was the respondent's application to revoke an order granted by the senior assistant registrar ('SAR') in favour of the petitioner and to maintain the decree nisi granted. Prior to the applications, on 22 March 2016 the court had entered decree nisi by consent where it was, amongst others, ordered that: (a) the marriage was dissolved; (b) the petitioner and respondent were to have joint custody and care of the children; and (c) the children were to stay with the respondent with the petitioner having reasonable access. The petitioner however applied to vary the court order by notice of application dated 4 October 2016 ('encl 30') which was subsequently allowed by the SAR. The respondent submitted that he was not given the opportunity to oppose encl 30 and that it was an ex parte order which should be set aside.

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Held, allowing the application to set aside the variation order granted by the SAR and reinstating the consent order of decree nisi with exceptions:

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(1) There were no merits in the respondent's allegations that he was not served or did not know of the application or the court order. The advocates for the petitioner served a copy of the application in encl 30 on the advocates of the respondent by a letter dated 5 October 2016 which was acknowledged by the respondent's advocates. There was no contrary evidence adduced by the respondent and the respondent did not allege that his advocates did not or neglected to inform him of the application. No affidavit was filed by the respondent to oppose the application and the respondent could not say that he was not given ample opportunity to oppose the application (see paras 13–15).

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(2) There was no reason to vary the joint custody as agreed by the parties. The petitioner did not complain or explain that there had been a material change in the circumstances why joint custody, as agreed after mediation should be varied. Since the decree nisi by consent, there was no material

change in the circumstances except that the petitioner was not given access to the children. The wishes of the parties and the two children were taken into consideration by the then presiding judge where the children wished to stay with the respondent and the SAR did not give any explanation why the order should be varied (see paras 22–23).

(3) The paramount consideration was the welfare of the children. There was nothing to suggest that the respondent and his mother did not take care or could not take care of the children. There was nothing to suggest that the respondent and his mother abused or illtreated them. The petitioner was given reasonable access to the children including overnight stay and the respondent must comply with the consent order (see para 25).

[Bahasa Malaysia summary

Terdapat dua permohonan. Pihak-pihak bersetuju agar permohonan pertama ('lampiran 40') didengar terlebih dahulu. Lampiran 40 adalah permohonan responden untuk membatalkan perintah yang diberikan oleh penolong kanan pendaftar ('PKP') menyebelahi pempetisyen dan untuk mengekalkan dikri nisi yang diberikan. Sebelum permohonan-permohonan tersebut, pada 22 Mac 2016 mahkamah telah memasuki dikri nisi dengan persetujuan di mana ia telah, antara lain, diperintahkan bahawa: (a) perkahwinan itu dibatalkan; (b) pempetisyen dan responden mempunyai hak penjagaan dan jagaan bersama anak-anak itu; dan (c) anak-anak itu hendaklah tinggal bersama responden dan pempetisyen mempunyai akses yang munasabah. Pempetisyen walau bagaimanapun telah memohon untuk mengubah perintah mahkamah itu dengan notis permohonan bertarikh 4 Oktober 2016 ('lampiran 30') yang kemudian telah dibenarkan oleh PKP. Responden berhujah bahawa dia tidak diberikan peluang untuk membantah lampiran 30 dan bahawa ia adalah perintah ex parte yang patut diketepikan.

Diputuskan, membenarkan permohonan mengetepikan perintah pengubahan yang diberikan oleh PKP dan mengembalikan perintah persetujuan dikri nisi dengan pengecualian:

(1) Tiada merit dalam pengataan responden bahawa dia tidak menyampaikan atau tidak mengetahui tentang permohonan atau perintah mahkamah itu. Peguam bagi pihak pempetisyen telah menyampaikan sesalinan permohonan dalam lampiran 30 ke atas peguam responden melalui surat bertarikh 5 Oktober 2016 yang diakui oleh peguam responden. Tiada keterangan bertentangan yang dikemukakan oleh responden dan responden tidak mengatakan bahawa peguamnya tidak atau cuai memberitahunya tentang permohonan itu. Tiada afidavit difailkan oleh responden untuk membantah permohonan itu dan responden tidak boleh mengatakan bahawa dia tidak diberikan peluang mencukupi untuk membantah permohonan itu (lihat perenggan 13–15).

(2) Tiada sebab untuk mengubah penjagaan bersama itu sepertimana yang dipersetujui oleh pihak-pihak. Pempetisyen tidak mengadu atau menjelaskan bahawa terdapat perubahan meterial dalam keadaan kenapa penjagaan bersama, sepertimana dipersetujui selepas pengantaraan patut diubah. Oleh kerana dikri nisi melalui persetujuan, tiada perubahan material kecuali pempetisyen tidak diberikan akses kepada anak-anak itu. Hasrat pihak-pihak dan dua anak-anak itu telah dipertimbangkan oleh mantan hakim yang bersidang di mana anak-anak berhasrat untuk tinggal dengan responden dan PKP tidak memberikan apa-apa penjelasan kenapa perintah patut diubah (lihat perenggan 22–23).

(3) Pertimbangan utama adalah kebajikan anak-anak itu. Tiada apa yang mencadangkan bahawa responden dan ibunya tidak menjaga atau tidak boleh menjaga anak-anak itu. Tiada apa yang mencadangkan bahawa responden dan ibunya mendera atau menganiaya anak-anak mereka. Pempetisyen telah diberikan akses munasabah kepada anak-anak itu termasuklah tinggal bermalam dan responden hendaklah mematuhi perintah persetujuan itu (lihat perenggan 25).]

Notes

For cases on consent order made, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4157–4161.

Cases referred to

Chong Lay Kwong v Lim Lay Kuan [2001] MLJU 137; [2001] 2 CLJ 492, HC (refd)

Ooi Siew Yook & Ors v Lim Bar Kee [1987] 2 MLJ 267; [1987] 2 CLJ 237 (refd)

PECD Bhd & Anor v AmTrustee Bhd and other appeals [2010] 5 MLJ 357; [2010] 1 CLJ 940, CA (refd)

Wong Phila Mae v Shaw Harold [1991] 2 MLJ 147, CA (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 96

Thomas Gawan (Kaidell Zaidell & Co Advocates) for the petitioner.
Fabian Sigar (Fabian Sigar Advocates) for the respondent.

Stephen Chung J:

[1] In July, 2015 the petitioner filed a petition for divorce against the respondent that the marriage be dissolved, that she be granted the custody and care of both the children of the marriage with reasonable access to the respondent and for the respondent to pay maintenance of RM1,000 per month for each of the children.

[2] Both parties were represented by their counsel and agreed to resolve their disputes via mediation. The respondent had yet to file his answers or defence to the petition. On 22 March 2016, by consent, the court entered decree nisi as follows:

(a) that the said marriage be dissolved;

(b) that the petitioner and respondent have joint custody and care of the children of the marriage namely, Danielle Cherengga (f) and Dulciena Sara (f);

(c) the children to stay with the respondent and the petitioner shall have reasonable access to the children including overnight stay;

(d) the respondent is responsible to maintain the children;

(e) no maintenance for the petitioner;

(f) no division of matrimonial properties; and

(g) the order to take effect from 26 March 2016.

[3] By a notice of application dated 4 October 2016 (encl 30), the petitioner applied to vary the court order. On 1 November 2016 the senior assistant registrar ('SAR') allowed the application. The order is as follows:

(1) that the petitioner be granted full custody and care of the children of the marriage with reasonable access to the respondent;

(2) the respondent to pay maintenance of RM1,000 per month for each of the children to be credited to their respective ASB account; and

(3) the petitioner be allowed to enter the matrimonial home to collect her personal belongings which were set out in a list marked 'F' annexed to her affidavit in support of her application.

[4] There are two applications before me. The first application ('encl 40') is by the respondent to revoke the order granted by the SAR in favour of the petitioner whereas the second application by the petitioner ('encl 49') is for leave for an order of committal against the respondent. Parties agreed that encl 40 should be heard first. In encl 40 the respondent applied that the order granted by the SAR on 1 November 2016 be revoked and that the decree nisi granted on 22 March 2016 be maintained. It should be noted that this is not an appeal against the decision of the SAR.

[5] The respondent complained that he never received the plaintiff's application in encl 30. He only came to know about the order upon receiving a telephone call from the court bailiff on the 30 November 2016. He contended that he had not received any letter or telephone call from the

petitioner's advocate in respect of the application. It was submitted that he was not given the opportunity to oppose the application and that it was an ex-parte order which should be set aside.

[6] The respondent submitted that the order granted on the 1 November 2016 was to deprive him of his rights to have joint custody and care of the children and the right and privilege to have the children staying with him at the matrimonial home as previously agreed to and recorded in the consent order.

[7] The respondent further submitted that the petitioner is not a fit and proper person to have custody and care of the children because prior to the hearing of the divorce the petitioner had on one occasion beaten their daughter Danielle Cherengga by knocking her head against the door at the petitioner's parent's house. He submitted that Dr Tan Weng Kang of Klinik Kesihatan Batu Kawa diagnosed that although there was no complication noted from the incident, their daughter was treated for a soft tissue injury as a result of the beating. He exhibited a medical report dated 7 August 2015.

[8] He said both the children of the marriage are afraid and scared to stay with the petitioner because the petitioner is hot tempered. He further submitted that Danielle Cherengga is currently undergoing psychology counseling at Hospital Umum Sarawak starting from 14 November 2016 to 19 December 2016 due to what the petitioner had done to her. He exhibited the appointment card.

[9] In opposition, the petitioner explained that she filed the application to vary the decree nisi due to a change of circumstances when the respondent denied her right for joint custody and access to the children of the marriage. She said she was not able to have access since 28 March 2016 when the respondent refused to allow her to take or even to have access to their children who were staying with the respondent.

[10] The petitioner submitted that there was no record that the respondent's advocate Messrs Terang, Manjit, Azmi & Hardip Singh Advocates had ceased to act for the respondent at the material time of service of the said encl 30 on the advocates of the respondent. It was submitted that the advocates did not inform the advocates of the petitioner that they were no longer acting for the respondent at the material time.

[11] It was submitted that the service was a good, valid and regular service of the said encl 30 on the respondent through his advocates and the respondent's allegation that he had no knowledge of the application was without any basis.

[12] The petitioner submitted that after the application was served, the

A respondent did not file any affidavit to oppose the application and disregarded the opportunity of appearing at and participating in the application. It was submitted that the respondent had made his decision and must be bound by the decision. It was submitted that the respondent has also delayed in making this application without reasonable explanation and therefore not entitled to
B the order prayed for.

[13] On the issue whether the respondent was served with encl 30, at the material times Messrs Terang, Manjit, Azmi & Hardip Singh Advocates were acting for the respondent. By a letter dated 5 October 2016, the advocates for
C the petitioner served a copy of the application in encl 30 on the advocates of the respondent on 6 October 2016. This service was duly acknowledged by the advocates acting for the respondent. The respondent did not adduce any evidence to the contrary. The respondent did not allege that his advocates did not inform him of the application or that his advocated neglected to inform
D him of the application. The respondent did not lodge any complaint against his advocates. Therefore he had notice or knew of the application.

[14] However, the respondent did not file any affidavit to oppose the
E application. The respondent could not say that he was not given ample opportunity to oppose the application. For nearly one month he did nothing. He did not explain that he was traveling or busy with work or that he could not afford an advocate to act for him. He could not say that it was an ex parte application which should be set aside.

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[15] The evidence showed that the order granted on 1 November 2016 was served on his Advocates Messrs Terang, Manjit, Azim & Hardip Singh vide a letter dated 2 November 2016. Again he did not complain that his advocates did not inform him of the court order or that they neglected to do so. Again he
G did not lodge a complaint against his advocates. The evidence showed that he appointed his present advocates on 7 December 2016. There are no merits in his allegations that he was not served or he did not know of the application or the court order.

H **[16]** Section 96 of the Law Reform (Marriage and Divorce) Act 1976 provides that the court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material
I change in the circumstances.

[17] A consent order can be varied: *Ooi Siew Yook & Ors v Lim Bar Kee* [1987] 2 MLJ 267; [1987] 2 CLJ 237. An order obtained ex parte by the petitioner may be set aside by the court on an application by the respondent on

the ground that the petitioner in obtaining the order did not make a full and frank disclosure of the facts to the court: see *Chong Lay Kwong v Lim Lay Kuan* [2001] MLJU 137; [2001] 2 CLJ 492; *PECD Bhd & Anor v AmTrustee Bhd and other appeals* [2010] 5 MLJ 357; [2010] 1 CLJ 940.

[18] In this application to revoke the variation order granted by the SAR, the respondent did not contend that the order was obtained by fraud or misrepresentation or without full and frank disclosure of the facts.

[19] Based on the petition and the statement on the arrangement for children, at the material times the two children were staying with the petitioner who was assisted by the petitioner's mother to take care of the two children. In her petition she applied for custody and maintenance of the two children.

[20] As stated, at that time the respondent had yet to file any answer or defence or affidavit in opposition to the petition. However, during the divorce proceedings, parties agreed for court assisted mediation to try to resolve their disputes. The parties also agreed for the then presiding judge to interview the two children.

[21] Based on the mediation and interview, the parties agreed to the consent order which was entered as the decree nisi on 22 March 2016. Based on the decree nisi, the petitioner and the respondent agreed to joint custody and that the children shall stay with the respondent with reasonable access to the petitioner including overnight stay.

[22] In encl 30 the petitioner applied that she be given full custody and care for the children to stay with her because the respondent denied her access to the children. It should be noted that custody and access are two different things. She complained she was denied access and not allowed to collect her personal belongings from the house but did not complain or explain why joint custody as agreed after mediation should be varied. Apart from access, she has not explained that there has been a material change in the circumstances so that the joint custody as agreed should be varied. The SAR has also not given any explanation why the order for joint custody as agreed should be varied. There is no reason to vary the joint custody as agreed by the parties.

[23] Should the decree nisi order be varied for the children to stay with the petitioner? The petitioner filed this petition in July 2015. The respondent in August 2015 lodged a police report against the petitioner for beating Danielle. The respondent has also exhibited a medical report on the incident. Based on the mediation and the interview of the children, and partly due to this incident, the parties agreed that the children should stay with the respondent. His mother would help to take care of the children. It should be noted that both

parties are working and both depended on their mother to take care of the two children. Since the decree nisi by consent, there has not been any material change in the circumstances except that she was not given access to the children. The then presiding judge has taken into consideration of the wishes of the parties and the wishes of the two children that the children wished to stay with the respondent. These have not changed and there is no material change in the circumstances. The SAR has not given any reasons for the variation and there is no reason why the decree nisi order by consent should be varied.

[24] Based on the hospital record exhibited, Danielle was suffering from stress due to school work and her additional responsibilities at school and is attending counseling to deal with her stress. Apart from that, there is no evidence that they are suffering from any illness or not doing well in school or at home.

[25] In such applications, the paramount consideration is the welfare of the children. Since the decree nisi, the children have been staying with the respondent and his mother. There is nothing to suggest that the respondent and his mother did not take care or could not take care of the children. There is nothing to suggest that the respondent and his mother have abused or ill-treated them. The court shall also have regard to the undesirability of disturbing the life of the children by changes in custody or living arrangements or environment: see *Wong Phila Mae v Shaw Harold* [1991] 2 MLJ 147. The petitioner is given reasonable access to the children including overnight stay. The respondent must comply with the consent order. In default thereto, he may be dealt with for contempt of the court order.

[26] For the reasons given, I will allow the application to set aside the variation order granted by the SAR and to reinstate the consent order of decree nisi, except: (i) I shall vary the access so that the petitioner shall have access to the children every weekend including overnight access, from 8am each Saturday to 5pm each Sunday; and (ii) para 3 of the order dated 1 November 2016, namely the petitioner is allowed to enter the matrimonial house to collect her personal belongings. Each party shall pay their own costs and the respondent shall pay the allocatur fees.

Application to set aside variation order granted by SAR allowed; consent order of decree nisi reinstated with exceptions.

Reported by Fatin Mohd Ismail